

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TIMOTHY FRANKS,	:	CIVIL ACTION NO. 02-2652
<i>Plaintiff,</i>	:	
	:	
v.	:	
	:	
COUNTY OF LEHIGH,	:	
THOMAS LAZORIK,	:	
BRIAN KAHLER, TED KEHM	:	
JANICE E. NESBIT, JANE	:	
BAKER, AND RICHARD O. KLOTZ,	:	
	:	
<i>Defendants.</i>	:	

**PLAINTIFF'S SECOND MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' APPLICATION FOR
COUNSEL FEES AND ASSOCIATED EXPENSES**

Presently pending before this Court is the Defendants' Application for Counsel Fees and Associates Expenses. The application must be denied. Plaintiff has already requested the Court to enter an Order striking the Application as being untimely, under F.R.C.P. 54. The Application was filed after the fourteenth (14) day prescribed time as set forth in F.R.C.P. 54. Thusly, the Defendants should be barred from seeking said fees.

In addition, the Application for Counsel Fees lacks any legal basis. The Third Circuit in EEOC v. Hosco Parts Corp., 57 Fed. Appx. 518, 2003, U.S. App., Lexis 1427, ruled that: “A prevailing defendant is not awarded attorney fees unless the plaintiff’s action was frivolous, unreasonable, or without foundation.” *see*: EEOC v. LB Foster Co., 123 F.3d 746, 751, (3d. Cir. 1997).

The Third Circuit looks to several factors in considering fees for a prevailing defendant, including: 1) whether plaintiff made a *prime facie* case; 2) whether the defendant offered to settle; and 3) whether the trial court dismissed the case before trial or held a full hearing on the merits.

Applying the above standards to the case at bar, Franks ADA claims are not frivolous. First, Plaintiff made a *prime facie* case. Second, U.S. Magistrate M. Faith Angel conducted two settlement conferences in this matter and Defendants did wish to settle the case. However, no agreement could be reached as to any settlement. Lastly, although the Court granted Defendants’ Motion for Summary Judgment, Plaintiff vigorously opposed said motion and the summary judgment record clearly revealed that the claim was not frivolous. In fact, Plaintiff has filed an appeal to the Third Circuit Court asserting that there existed a genuine issue of material fact that Plaintiff was terminated because of his disability in violation of the Americans with Disabilities Act.

Based on the facts as set forth herein above, the Defendants' Application for Counsel Fees and Associates Expenses must be denied.

Respectfully submitted,

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